Restitution Update: Determination of the Restitution Amount

Update of *"The Imposition of Restitution in Federal Criminal Cases"*
from *Federal Probation*, December 1998
by Catharine M. Goodwin, Assistant General Counsel
Administrative Office of the United States Courts

The goals of this article are to provide the legal background, focusing on recent cases and new issues, for: 1) determining the amount of restitution discussed in the 1998 article on restitution in *Federal Probation*;[1] 2) determining a defendant's ability to pay restitution; 3) imposing restitution; and 4) enforcing a restitution order. The restitution cases and issues are proliferating, now that courts are applying the MVRA more frequently, and restitution is becoming a more prominent part of the sentencing process in federal criminal cases.

I. Update on Determining the Amount of Restitution

A well known jurist has noted that Black's Law Dictionary defines restitution as an "[a]ct of restoring ... anything to its rightful owner; the act of making good or giving equivalent for any loss, damage or injury; and indemnification."[2] The long history of the payment for wrongs is closely intertwined with concepts of punishment and justice; early forms of restitution, such as the law of Moses, required fourfold restitution for stolen sheep and fivefold for the more useful ox.[3] In England, there were elaborate and detailed systems of victim compensation in the Middle Ages, but with the ascension of the reign of kings, the state began to be treated as the "victim" of criminal offenses, and crimes came to be thought of as offenses against society rather than against the individual.[4] Currently, "The United States is in a state of transition on restitution,"[5] and is increasingly becoming part of modern criminal jurisprudence.

The most sweeping change made to restitution for federal criminal cases since 1982 came on

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[1]Goodwin, "The Imposition of Restitution in Federal Criminal Cases," *Federal Probation*, Vol. 62, No. 2, December 1998, pp. 95-108.

[2]U.S. v. Ferranti, 928 F.Supp. 206 (E.D.N.Y. 1996) (J. Weinstein), *aff'd sub nom* U.S. v. Tocco, 135 F.3d 116 (2d Cir. 1998), *cert denied*, Ferranti v. U.S., 523 U.S. 1096 (1998) (citing *Black's Law Dictionary*, 1477 (4th ed. 1968).

[3]Id. 928 F.Supp. at 220.

[4]Id. at 221.

[5]Id. at 219. See also, Garvey, "Punishment as Atonement," 46 USLALR 1801, n. 71 (1999), noting that "23 states mandate restitution generally, 24 require it as a condition of probation or parole, and 14 require it under other circumstances, such as when a suspended sentence is imposed or the inmate participates in a work-release program," (citing Sarnoff, "Paying for Crime: The Policies and Possibilities of Crime victim reimbursement," 17-18 (1996)).

April 24, 1996, when Congress enacted the Mandatory Victims Restitution Act of 1996 (MVRA).[6] The MVRA, among other things, created § 3663A,[7] which requires mandatory restitution for all violent offenses, title 18 property offenses, and consumer tampering offenses. The MVRA also potentially broadened the definition of "victim" for both discretionary and (the new) mandatory restitution by defining a "victim" of the offense as a "person directly *and proximately* harmed *as a result of the commission of* an offense,"[8] and it strengthened the imposition and enforcement provisions in § 3664 and in the debt collection statutes,[9] to ensure greater collection of restitution by the government in the same manner as a fine.[10]

The MVRA is gradually changing the restitution landscape in federal criminal law. As courts begin to interpret its provisions, they are generally concluding that the effect of the MVRA was to provide an "expansive and powerful remedy."[11] Undoubtedly Congress intended, beginning in 1982, that as many victims be compensated as possible, and restitution amendments since 1982 (and especially the MVRA) illustrate, "... a history marked by ... constant expansion of the restitution remedy."[12]

The determination of the restitution amount at sentencing in a federal criminal case involves several substantial legal issues. This determination involves identifying the offense of conviction, then the victims of the offense, then what harms were caused to those victims by the offense conduct, and finally which of those harms (and certain costs) are statutorily compensable as restitution. The determination

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[6]Title II of the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (1996).

[7]All section cites herein, if not otherwise noted, are from title 18.

[8]See § 3663A(a)(2) for mandatory restitution and § 3663(a)(2) for discretionary restitution. The prior language in § 3663(a)(1), which was the closest thing to a definition of "victim" provided that the defendant make restitution to any "victim of the offense."

[9]See §§ 3571 et. seq.

[10]Sections 3663, 3663A, and 3664 are probably "the VWPA, as amended." And, although "MVRA" refers to specific legislation, it made such sweeping changes to what was formerly the VWPA, that these statistics are sometimes now referred to *as* the MVRA. Herein, "MVRA" refers to the Act of Congress or to provisions created or significantly modified by it, whereas "VWPA" refers to the "primary" restitution statutes (§§ 3663 and 3664, along with the newer § 3663A), as distinct from the "specific title 18 mandatory restitution statutes."

[11]U.S. v. Minneman, 143 F.3d 274, 284 (7th Cir. 1998) (citing U.S. v. Martin, 128 F.3d 1188, 1190-93 (7th Cir. 1997), holding that the expanded fact-finding procedures for restitution indicates Congress intended that courts determine difficult issues such as the amount of tax owing for restitution, for conspiracy to violate the tax laws.

[12]U.S. v. Martin, 128 F.3d 1188, 1196 (7th Cir. 1997); see also, U.S. v. Malpeso, 943 F.Supp. 254 (E.D.N.Y. 1996) (J. Weinstein), at 257 (citing the VWPA and U.S. v. Ferranti, 928 F.Supp. 206, 217-19, 220-221 (E.D.N.Y. 1996), discussing in detail the history of restitution and relating the role of pecuniary penalties in the French system and its increasing acceptance in the United States system).

of the restitution amount must be made in *any* case for which there is an identifiable victim, whether the restitution is mandatory or discretionary. The restitution amount is *imposed* in all *mandatory* restitution cases. However, in any *discretionary* restitution case, the court must balance the restitution amount with the defendant's ability to pay, in order to determine how much restitution to impose. The restitution determination, if done correctly, will avoid subsequent litigation, and will maximize the amount of restitution that can be imposed and, hopefully, collected.

The following Five Steps were created and discussed in the previous restitution article,[13] with the goal of assisting probation officers and their courts with the restitution determination. When the determination of restitution is broken down into these "steps" consistent and accurate results are more likely - especially where the steps are used in sequence. The five steps are summarized below, and recent case law is added to illustrate the issues, and to explain how courts are beginning to interpret and apply the 1996 MVRA provisions.

A. *Step One*: Identify the Statutory Offense of Conviction.

It is appropriate that the determination of restitution begin with the determination of the statutory offense of conviction, because restitution is strictly a *statutory* penalty. The court's authority to impose restitution is controlled by the language and terms in the restitution statutes.
The identification of the specific offense of conviction is the first step in the restitution analysis, because the offense of conviction enables, in turn, three important preliminary determinations: 1) whether restitution is mandatory or discretionary;[14] 2) whether restitution is available as a separate sentence or only as a condition of supervision; and 3) what the outer limits of the offense are - a necessary determination for identifying victims and harms in, Steps 2 and 3, and what kinds of harms will be compensable, in Step 4.[15]

B. *Step Two*: Identify the Victims of the Offense of Conviction

In 1990, the Supreme Court, in Hughey v. U.S.,[16] held that federal statutes only authorize restitution for victims of the offense of conviction, because The "loss caused by the conduct underlying

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[13]See Goodwin, supra.

[14]Offenses for which restitution is mandatory are listed in § 3663A (and certain specific title 18 mandatory provisions apply to particular groups of offenses); those for which restitution is authorized as a separate sentence but for which it is discretionary (depending on the defendant's ability to pay) are listed in § 3663.

[15]Most of the specific title 18 mandatory restitution statutes have a broader causation standard and more specifically compensable harms than to the primary restitution statutes, §§ 3663 and 3663A.

[16]495 U.S. 411, 413 (1990).

the *offense of conviction* establishes the outer limits of a restitution order."[17] Despite numerous legislative changes to the restitution statutes during the 1990's, that basic rule remains primarily intact. Many restitution cases still involve the scope of the offense of conviction, which is generally narrower than the scope of the offense for guideline sentencing purposes. Determining the scope of the offense for restitution purposes is not always obvious. Two recent firearms cases provide examples.

In U.S. v. Reed, the Ninth Circuit held that there could be no restitution for the damage to vehicles caused while the defendant was fleeing police, when the offense of conviction was felon in possession of a firearm, even though the conduct was related to the offense of conviction, because damaging vehicles is not an element of the offense of conviction.[18] On the other hand, the Tenth Circuit took a broader approach in U.S. v. Smith,[19] where the offense of conviction was § 924(c). The defendant admitted using the gun while robbing a credit union, from which he took $11,709, and was ordered to pay that amount in restitution. He appealed, arguing that the credit union was not a "victim" of the § 924(c) offense. The court upheld the restitution on two, apparently independent, grounds. First, the Information identified the credit union as the victim of the charged offense (and the defendant agreed "to make restitution " to the "victim of the offense charged,"- although the court noted such a non-specific agreement would not by itself have supported the restitution order). Second, and most importantly for this discussion, the court upheld the restitution because the victim's use of the gun during the robbery was "an integral part and cause of the injury and loss to the credit union."[20]

Schemes, Conspiracies, and Patterns of Criminal Activity

The determination of the scope of the offense is often most difficult where "schemes" or conspiracies are involved. Title 18 U.S.C. § 3663(a)(2) provides in pertinent part:

> *... the term "victim" means ... in the case of an offense that involves as an element a scheme, conspiracy, or pattern of criminal activity, any person directly harmed by the defendant's criminal conduct in the course of the scheme, conspiracy, or pattern.*[21]

The "scheme" provision is among the most litigated, and is perhaps the most difficult aspect of determining restitution. The courts have not always achieved consistency in its application, and the cases remain extremely fact-driven. While there may be a few general differences among the circuits,

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[17] Id.

[18] 80 F.3d 1419 (9th Cir. 1996).

[19] 182 F.3d 733 (10th Cir. 1999).

[20] Id. at 736.

[21] See also § 3663A(a)(2), added in 1996 for mandatory restitution offenses.

there is no clear split.[22] A closer look at the key case of Hughey v. U.S.(Hughey I)[23] is helpful, because it was a "scheme" case. In Hughey the defendant was alleged to have stolen and used 21 credit cards in a fraudulent scheme that resulted in a total loss to numerous victims of over $90,000. Hughey plead guilty to one count of the scheme, which involved one credit card and resulted in $10,000 in loss, and the defendant was ordered to pay restitution for the entire scheme. The Fifth Circuit affirmed, interpreting the VWPA to allow restitution for acts which share a "significant connection" with the offense of conviction. But the Supreme Court reversed, holding that "the language and structure of the [VWPA] make plain Congress' intent to authorize an award of restitution only for the loss caused by the specific conduct that is the basis of the offense of conviction.[24]

In 1990, Congress added the above "scheme" amendment to § 3663(a), and in 1996 it added the identical provision, § 3663A(a), for mandatory restitution. This provision has been described as enlarging the set of victims to whom restitution can be granted.[25] That is true, for example, in telemarketing cases. However, if the offense involves numerous acts against one victim (such as several embezzlements or thefts from one bank), this provision enlarges the scope of the offense conduct to include acts that are part of the scheme rather than more victims.

But courts have recognized that this provision is "not so broad that it permits a district court to order restitution to anyone harmed by any activity of the defendant related to the scheme, conspiracy or pattern."[26] That part of Hughey which restricted the award of restitution to the limits of the offense still stands.[27] The amendment "does not explicitly extend the contours of the word 'offense.'"[28] Thus, while restitution is only authorized for the offense of conviction, this provision expands the scope of that offense, under certain circumstances. It is this expansion of the offense - within the contours of the offense - that sets up the inherent tension, around which much litigation has been generated. The cases and issues on this provision may best be analyzed in two categories: 1) How does the court determine whether the offense of conviction "*involves*" a scheme, conspiracy, or pattern of criminal activity? and 2) Where a scheme is "involved," how does the court determine the *extent and scope* of the scheme in order to determine which acts are part of that scheme?

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[22]The Eighth Circuit seems to more consistently interpret the scope of the offense broadly, while most others, such as the Ninth and Fourth, more consistently interpret it narrowly, and others are mixed.

[23]495 U.S. 411 (1979) (Hughey I).

[24]495 U.S. at 413.

[25]See, e.g., U.S. v. Akande, 200 F.3d 136, 139 (3d Cir. 1999).

[26]U.S. v. Kones, 77 F.3d 66, 70 (3d Cir. 1996).

[27]U.S. v. Upton, 91 F.3d 677, 686 (5th Cir. 1996), cert denied, 117 S.Ct. 1818 (1997).

[28]U.S. v. Welsand, 23 F.3d 205, 207 (8th Cir. 1994).

a) Does the Offense "Involve as an Element" a Scheme? Most courts have strictly applied the requirement that one of the "elements" of the offense involve a scheme, conspiracy or pattern. If the offense of conviction includes a charge of conspiracy, or if it incorporates by reference a mail, wire, or bank fraud that is detailed in the indictment, it is obvious that the offense "involves" a scheme or conspiracy. For example, in U.S. v. Pepper, the Fifth Circuit upheld restitution for victims who were unnamed in indictment of a mail fraud scheme, where the indictment described the duration of the scheme and methods used.[29] The First Circuit, in U.S. v. Hensley, upheld restitution for victims of a scheme to obtain merchandise under false pretenses, even though the government did not learn of the victim until after the plea, because the indictment described the general scheme from which the victims suffered losses.[30] In U.S. v. Henoud, the Fourth Circuit upheld restitution ordered for all victims (not just victims named in the indictment) of the defendant's scheme to defraud long-distance carriers.[31] And in U.S. v. Obasohan, the Eleventh Circuit upheld restitution for victims of a scheme to obtain credit cards, even though the defendant was convicted only of an attempt to obtain just one credit card.[32]

Conversely, where there is no such element in the offense of conviction, courts are likely to find that restitution cannot be imposed for acts not described by the elements of the offense, itself. For example, where the offense of conviction was the unauthorized use of credit cards, the Fourth Circuit held the court could not impose restitution for the theft of the purses and cards because the offense of conviction had no element of theft, in US v. Blake.[33]

It is not as easy to determine if the offense "involves" a scheme, however, where the offense of conviction is one that requires an "intent to defraud," but where there is no scheme alleged in detail and incorporated in each count, as there is for wire, mail, and bank fraud. It is probably safe to assume Congress intended such offenses to be included among those "involving" a scheme because to "defraud" means to commit fraud, and a fraud is carried out by a "scheme."[34] But it is probably no coincidence that many of the cases in which courts have struggled with the scope of the "scheme" for restitution purposes have involved offenses such as 18 U.S.C. § 1029, where the offense involves "knowingly and with *intent to defraud,* trafficking in or using one or more unauthorized access

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[29]51 F.3d 469, 473 (5th Cir. 1995). See also, U.S. v. Stouffer, 986 F.2d 916, 928-29 (5th Cir. 1993).

[30]91 F.3d 274, 276-78 (1st Cir. 1996).

[31]81 F.3d 484, 489 (4th Cir. 1996).

[32]73 F.3d 309, 311 (11th Cir. 1996).

[33]81 F.3d 498, 506 (4th Cir. 1996).

[34]*The American Heritage Dictionary*, 2d College Edition, defines "scheme" as "A systematic plan of action; an orderly combination of related parts or elements; a plan, especially a secret or devious one; plot..." Legally, a fraudulent scheme commonly involves causing others to rely on false statements (or acts) to their detriment.

devices." (emphasis added).[35] Even though an "intent to defraud" probably implies a scheme, the nature and extent of the "scheme" are usually not clear from the indictment for such offenses, and litigation is generated by the ambiguity of the contour of the offense.

Offenses for which there is not even an "intent to defraud" element pose even greater difficulties for courts in determining if there is a scheme and what the nature of the scheme is, sometimes with awkward results. For example, in U.S. v. Mancillas, the offenses of conviction were possessing counterfeit securities and knowingly possessing implements designed to make counterfeit securities - with intent that they be used, in violation of 18 U.S.C. § 513.[36] To use counterfeit securities is to defraud others, which implies a "scheme" - but with what parameters? The Fifth Circuit concluded that restitution could not be imposed for past acts of using the counterfeit securities because the offense was to possess them (and their manufacturing implements) with the intent to use them - in the future.[37]

The Mancillas trial court had attempted to justify its restitution award by relying on the MVRA terminology of harm "directly and proximately" caused by the offense. It also held that possession "with the intent to use" indicated an element of "use," thereby allowing restitution for the use of the securities. But the Fifth Circuit held that the MVRA language did not broaden the criteria for restitution, and that, "Mancillas' possession of the implements with the intent to use them in the future can in no way be said to directly and proximately have caused a previous harm, specifically, the harm to the check-cashing companies."[38]

Where the offense does not expressly contain an element of conspiracy or scheme, some courts have been willing to look outside the offense of conviction to determine if the scope of the facts alleged in the indictment, or the proof at trial, indicate the existence of a scheme.[39] For example, in U.S. v. Jackson,[40] the offense was a conspiracy to possess unauthorized credit cards and ID documents, but

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[35]See, e.g., U.S. v. Akande, 200 F.3d 136 (3d Cir. 1999); Hughey v. U.S. (Hughey I), 495 U.S. 411 (1990); U.S. v. Hughey (Hughey II), 147 F.3d 423 (5th Cir. 1998); U.S. v. Hayes, 32 f.3d 171 (5th Cir. 1994); U.S. v. Cobbs, 967 F.2d 1555 (11th Cir. 1992); U.S. v. Moore, 127 F.3d 635 (7th cir. 1997) ; U.S. v. Blake, 81 f.3d 498 (4th Cir. 1996); U.S. v. Stouffer, 986 F.2d 916 (5th Cir. 1993).

[36]172 F.3d 341 (5th Cir. 1999).

[37]172 F.3d at 343.

[38]172 F.3d at 343.

[39]Possibly lending support to looking beyond the "elements" is the fact that the statutory provision also refers to a "pattern of criminal activity" - a term not easily identified as an "element." This term suggests a series of related acts and appears to invite an examination of the facts (alleged or proven). This is yet another inherent contradiction involved with this provision which makes its application problematic in some cases.

[40]155 F.3d 942 (8th Cir. 1998). See also, U.S. v. Manzer, 69 F.3d 222, 230 (8th Cir. 1995) (quoting U.S. v. Welsand, 23 f.3d 205,207 (8th Cir.), cert denied, 115 S.Ct. 641 (1994)).

restitution was upheld for the theft of ID documents and the cards, because the *evidence at trial* indicated that the thefts were "in furtherance" of the conspiracy. In U.S. v. Hughey (Hughey II), the court held that part of the restitution was invalid for losses that "fall outside the offense as defined in the indictment, and *the trial record* does not otherwise tie those losses to Hughey's fraudulent scheme."[41] However, it is recommended that probation officers take the more conservative course of looking only at the offense of conviction to determine whether it involves (an element of) a scheme, conspiracy, or pattern of criminal activity.

b) Which acts are Included in the Scheme? Once it is established that the offense of conviction *involves* (an element of) a conspiracy, scheme, or pattern of criminal activity, the court must then determine the extent or nature of the scheme, in order to determine which acts are within the scope of the scheme and can therefore be the basis of restitution. While the charging document that is the basis of the trial conviction or plea is the primary basis of this determination (just as it was for whether the offense *involves* a scheme), it is appropriate and common that courts look also at the plea agreement and colloquy or the facts proven at trial to determine which acts are part of the conspiracy or scheme, for restitution purposes. For example, in U.S. v. Martin, the offense of conviction was mail fraud and bribery; therefore, the offense involved as an "element" a fraud scheme. The Seventh Circuit held that, in determining the scope and consequences of the scheme, the judge was not limited to the evidence presented at the trial.[42]

In determining the scope of the conspiracy or scheme, some courts have noted that the "temporal limits" of the offense (i.e., the dates alleged for the scheme in the indictment) are important. For example, in U.S. v. DeSalvo, the Ninth Circuit said the indictment's temporal limits must be read narrowly;[43] in U.S. v. Hensley, the First Circuit referred to the "duration" and "timing" of the offense of conviction.[44] Unfortunately, two recent cases have relied on such language to conclude that the dates alleged for the scheme or conspiracy in the indictment are not only factors to consider in determining the scope of the scheme, but they are *determinative* - at least where there was a plea. In Hughey II, supra,[45] the count of conviction alleged a "comprehensive scheme of bank fraud," the victims of that

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[41]147 F.3d 423, 438 (5th Cir. 1998), cert denied, 119 S.Ct. 569 (1998).

[42]195 F.3d 961, 969 (7th Cir. 1999). See also, U.S. v. Savage, 891 F.2d 145, 151 (7th Cir. 1989); U.S. v. Obasohan, 73 F.3d 309 (11th Cir. 1996) (per curiam)); and U.S. v. Hughey (Hughey II), 147 F.3d 423 (5th Cir. 1998) (indictment specifically defined duration of the scheme and the fraudulent conduct, and no restitution could be imposed for losses not tied by the trial record to the scheme).

[43]41 F.3d 505, 515 (9th Cir. 1994).

[44]92 F.3d 274, 276-78 (1st Cir. 1996). See also, U.S. v. Silkowski, 32 F.3d 682, 689 (2d Cir. 1994) (losses "directly caused by conduct within the temporal limits of the offense of conviction"); and U.S. v. Hayes, 32 F.3d 171, 173 (5th Cir. 1994) (no restitution was allowed for losses incurred before the date of the offense of conviction).

[45]147 F.3d 423 (5th Cir. 1998), cert denied, 119 S.Ct. 569 (1998) (Hughey II).

count were indeed victims of the bank fraud alleged in the count of conviction, and their losses occurred as a result of that same fraud scheme. But the Fifth Circuit held that restitution could not be imposed for losses that were incurred one month prior to the time period alleged in the count of conviction for the fraud scheme - to which the defendant entered a plea.

Similarly, in U.S. v. Akande, the Information to which the defendant plead alleged the conspiracy to have taken place "from on or about December 31, 1997 to on or about July 8, 1998," and the Third Circuit reversed any restitution imposed for acts that were part of the conspiracy but which occurred outside of the dates of the conspiracy alleged in the Information.[46] The court held that the scheme amendment "did not extend the length of the period attributable to the offense of conviction....We therefore find ourselves in agreement with the Hughey II Court that the offense of conviction is temporally defined by the period specified in the indictment or information."[47]

It may be true that because "the government 'has control over the drafting' of the Information, it bears the burden of 'includ[ing] language sufficient to cover all acts for which it will seek restitution."[48] However, these cases' literal reliance on the charging dates as the sole determinant of the extent of the scheme is inconsistent with the fundamental principle that allegations of sentencing factors (e.g., drug amounts or amount of restitution) are not controlling, and that the court makes those determinations. Also, these cases are inconsistent with the many others that apply the scheme provision more broadly, and with the clear legislative intent of both the VWPA and the MVRA to maximize the imposition of restitution to victims of crime. These cases are probably best understood in the context of a plea, but even then appear overly narrow.
Also, even under this date-determinative view, alleged dates *of the scheme or conspiracy* define the contours of the offense, not those of specific acts in furtherance of the scheme or conspiracy in the counts of conviction.[49]

c) Other "Scheme" Issues. Unnamed victims. Victims do not need to be named in the indictment, so long as they were victimized by the scheme.[50] However, the victims must be victimized

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[46]200 F.3d 136 (3d Cir. 1999).

[47]200 F.3d 136, 141 (3d Cir. 1999).

[48]Akande, 200 F.3d at 142 (quoting DeSalvo, 41 F.3d at 514).

[49]For example, assuming that the offense of conviction contains an element of a scheme, the scheme is alleged to have begun in January and ended in August, the counts of conviction involve specific acts in March and April, and all acts in question are clearly part of the scheme: any such acts that are within the January - August time frame can be included for restitution purposes, under this view.

[50]See, e.g., Pepper, supra; Stouffer, supra; Hensley, supra; and Henoud, supra.

by the scheme, not simply by conduct related to the scheme, in order for restitution to be imposed.[51]

Co-participant acts. The statutory scheme provision authorizes restitution for "*the defendant's* criminal conduct in the course of the scheme, conspiracy, or pattern."[52] Despite this language, courts have generally upheld restitution for harms that result from the acts of other participants as well, so long as they are part of the scheme or conspiracy.[53] Some courts have held that the acts of the co-participants must be "foreseeable" to, or jointly undertaken by, the defendant,[54] which is consistent with jointly undertaken "reasonably foreseeable" criminal conduct for relevant conduct or mandatory minimum purposes.[55] Where the defendant is convicted of conspiracy, the courts have generally applied the "scheme" provision to require restitution for all losses resulting from acts in furtherance of the conspiracy.[56]

For example, in U.S. v. Davis, the Eleventh Circuit upheld a $8-9 million restitution order for all reasonably foreseeable acts of co-conspirators in a complex Medicare fraud scheme.[57] "Each appellant herein had a sufficiently substantial involvement in the fraud scheme to warrant the restitution amount.....Our conclusion follows the general proposition that a defendant is liable for reasonably foreseeable acts of others committed in furtherance of the conspiracy of which the defendant has been convicted," and the court did not err in imposing restitution jointly and severally on all defendants, "based on the acts of all those involved in the scheme for the period that the appellant was involved."[58]

Where there is a scheme or conspiracy, the court must make an individualized determination of restitution for each defendant in a scheme or conspiracy, just as it must determine the drug amount each

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[51]US v. Kones, 77 F.3d 66, 70 (3d Cir.), cert denied, 117 S.Ct. 172 (1996) (restitution invalid when defendant was convicted of mail fraud scheme to submit false insurance claims, where patient who became addicted to pain killer obtained in scheme not victim of scheme).

[52]§§ 3663(a)(2) and 3663A(a)(2) (emphasis added).

[53]See, e.g., U.S. v. Nichols, 169 F.3d 1255 (10th Cir. 1999).

[54]U.S.S.G. §1B1.3(a)(1)(B).

[55]See, Goodwin, "Determining Mandatory Minimum Penalties in Drug Conspiracy Cases," *Federal Probation*, Vol. 59, No. 1, March 1995, pp. 74-78 (hereinafter Goodwin II).

[56]U.S. v. Brewer, 983 F.2d 181, 185 (10th Cir. 1993) (good discussion of acts of co-participants for restitution); U.S. v. Obasohan, 73 F.3d 309 (11th Cir. 1996); U.S. v. Plumley, 993 F.2d 1140, 1142 (4th Cir.), cert denied, 510 U.S. 903 (1993); U.S. v. Sanga, 967 F.2d 1332, 1334 (9th Cir. 1992).

[57]117 F.3d 459 (11th Cir. 1997).

[58]117 F.3d at 463-64 (citations omitted).

defendant is responsible for within a conspiracy for mandatory minimum purposes.[59] For example, in U.S. v. Neal, where the defendant was convicted only of accessory after the fact, but received the same (full) restitution order as all other defendants, the First Circuit vacated the order because there was no basis in the record to determine if the defendant was responsible for the total loss caused by the conspiracy or not.[60] While restitution is not automatically less for a defendant convicted of accessory after the fact,[61] it may be, and the court must consider restitution as it pertains to each defendant's conduct in the offense of conviction.

MVRA changes. A few courts have now had the occasion to decide whether the terms "directly and proximately" introduced by the MVRA made a significant difference in determining the scope or existence of the scheme or conspiracy. These pioneer cases have decided that there is no significant difference in the scheme analysis.[62] This is not surprising, given the fact that the statutory language involving schemes was not changed by the MVRA. They also note that the legislative history of the MVRA indicates Congress' intent to preserve the principle that restitution can only be imposed for the offense of conviction.[63] These early cases conclude that the MVRA did not change the fact that restitution can only be imposed for the offense of conviction.[64]

Beyond the statute of limitations. Some courts have held that restitution can be imposed for acts beyond the statute of limitations, so long as they are part of the scheme of the offense of conviction, as described in the indictment. For example, in U.S. v. Bach, the Seventh Circuit upheld restitution for the entire mail fraud scheme, even though mailings the defendant sent to lull victims were the only ones within the statute of limitations.[65] It should be noted that the *ex post facto* clause is not an obstacle to including such acts, so long as the offense continued within the statute of limitations - and schemes and conspiracies are, by nature, continuing offenses.

Acquitted counts. Restitution can be imposed for harm caused by conduct committed in counts

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[59]See Goodwin II, supra.

[60]36 F.3d 1190, 1199 (1st Cir. 1994).

[61]U.S. v. Baker, 25 F.3d 1452, 1456 n.5 (9th Cir. 1994).

[62]Akande, supra, 200 F.3d at 139; Hughey II, supra, 147 F.3d at 437.

[63]Restitution is to be ordered where the loss was "directly and proximately caused by the court of conduct under the count or counts for which the offender is convicted." Sen. Rep. No. 104-179, at 19, reprinted in 1996 U.S.C.C.A.N. 924, 932 (cited in Akande, 200 F.3d at 141).

[64]Mancillas, 172 F.3d at 343.

[65]172 F.3d 520 (7th Cir. 1999); see also, U.S. v. Welsand, 23 F.3d 205, 207 (8th Cir. 1994), cert denied 115 S.Ct. 641, upholding restitution for all losses during an 11-year mail fraud scheme, not just those acts within the 5-year statute of limitations.

which were acquitted, so long as the court determines that the conduct was part of the scheme, pattern, or conspiracy for which there was a conviction.[66] But restitution may not be ordered for victims of acquitted counts *if* the court interprets the acquittal to mean that the conspiracy did not include those acts.[67]

In summary, the "scheme" provision expands the offense of conviction for restitution purposes, and enables the court to identify restitution victims or harms more broadly than it could otherwise. However, the restitution award is most likely to be upheld to the extent that the probation officer is able to assist the court in articulating, a) how the offense of conviction "involves as an element" a scheme, conspiracy, or pattern of criminal activity, and b) how the acts for which restitution is imposed are part of that scheme, pattern, or conspiracy.

C. *Step Three*: Identity the Harms to the Victims Caused by the Offense of Conviction

Recent cases have illustrated that restitution can only be imposed for harms that are *caused* by the conduct underlying the offense of conviction. The Seventh Circuit, in U.S. v. Brierton, recently held that harms from acts involved in the cover-up of a fraud offense (even though those acts were part of the same common scheme or plan as the offense, and thus part of the relevant conduct of the offense) are not harms "caused" by the offense.[68] The defendant was the president of a credit union who was convicted of making false entries in the credit union's books with the intent to deceive auditors. Her relevant conduct included numerous other acts of a similar nature, many of which were committed to cover up the offense conduct. However, the Seventh Circuit found that the loss caused by these acts were not part of the loss "caused" the offense of conviction.[69] Note that the same result is reached if the cover up acts are viewed as outside the scope of the offense.

Sometimes there are legal as well as illegal causes of a loss. In U.S. v. Martin,[70] the Seventh Circuit held the defendants could not be held responsible for the total amount of loss ($12.3 million) that resulted from a loan default, because the loss was not caused by the bribery scheme. The loan default was only partially caused by the defendants' conduct. The case was remanded for the court to determine how much of the loss was determined by legal (although unethical) activity and how much by

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[66] See, e.g., U.S. v. Dahlstrom, 180 f.3d 677 (5th Cir. 1999) (restitution was upheld for the entire common scheme to defraud, even though some of the counts were acquitted); U.S. v. Chaney, 964 F.2d 437 (5th Cir. 1992); U.S. v. Farkas, 935 F.2d 962 (8th Cir. 1991).

[67] U.S. v. Kane, 944 F.2d 1406 (7th Cir. 1991).

[68] 165 F.3d 1133 (7th Cir. 1999).

[69] 165 F.3d at 1139.

[70] 195 F.3d 961 (7th Cir. 1999).

the illegal offense conduct.

Reasonable estimation. Sometimes a mere estimation of the harm is all that is possible, but that is sufficient for restitution, just as it is for determining "loss" under the guidelines. "[T]he determination of an appropriate restitution amount is by nature an inexact science."[71] And Congress recognized in the legislative history for the VWPA that, "[W]here the precise amount [of restitution] owed is difficult to determine, [18 U.S.C. § 3664] authorizes the court to reach an expeditious, reasonable determination of appropriate restitution by resolving uncertainties with a view toward achieving fairness to the victim."[72] A recent case that illustrates the creative and successful estimation of the value of "harm" for restitution purposes is U.S. v. Sapoznik, in which the Sixth Circuit upheld a restitution order of one year's salary to be paid to the city by a former Police Chief, convicted of taking bribes for four years, as a proper measure of his illegal activities (mixed in with what was agreed to be primarily beneficial, legal services to the city).[73]

Routine Costs Excluded. The rule of thumb that restitution does not include *routine costs* to the victim is illustrated by the recent case of U.S. v. Menza, in which the defendant was convicted of manufacturing methamphetamine after his homemade meth lab exploded, damaging his apartment.[74] The sentencing court ordered restitution for the cost to the government for disposing of various chemicals, and to the landlord for cleaning the apartment, but the Seventh Circuit remanded for the court to determine which costs were directly caused by the meth lab offense, and which costs were routine, for both the landlord and for the government.

Effect of "Directly and Proximately." In 1996, Congress added the words "directly and proximately" to describe how restitution victims are harmed by the offense of conviction.[75] There have been few cases analyzing the effect of these terms. The term "proximately" invokes the legal concept of "proximate cause," which has the potential of expanding harms to include all "foreseeable" consequences of one's acts, as it does in the law of torts. The legislative history of the MVRA indicates that there must be a causal relationship between the offense conduct and the harm for which restitution

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[71]U.S. v. Teehee, 893 F.2d 271, 275 (10th Cir. 1990).

[72]S.Rep. No. 532, 97th Cong., 2d Sess. 31, reprinted in 1982 U.S.C.C.A.N. 2515, 2537. See also, U.S. v. Brewer, 983 F.2d 181, 185 (10th Cir. 1993).

[73]161 F.3d 117 (7th Cir. 1998).

[74]137 F.3d 533 (7th Cir. 1998).

[75]The victim is one who is "directly and proximately" harmed, in §§ 663A and 3663, or harmed as a "proximate result of the offense," in the specific title 18 mandatory restitution statutes.

is ordered.[76] It is most likely that the term "proximately" will ultimately be interpreted as slightly expanding the scope of restitution, consistent with its connotation in other legal contexts and with the clear congressional intent behind the MVRA to maximize the imposition and enforcement of restitution. A recent Seventh Circuit case noted the clear intent of Congress to maximize restitution to victims, stating that the VWPA, "its legislative history, and its amendments since 1982 all demonstrate a clarion congressional intent to provide restitution to as many victims and in as many cases as possible.[77]

The courts are just now beginning to interpret the effect of the MVRA changes. Despite those discussed above that concluded "proximately" did not change the "scheme" analysis, some courts have noted that it does help to broaden restitution in non-scheme cases. In a recent Tenth Circuit case, U.S. v. Checora,[78] the juvenile children of a victim of manslaughter were found to be victims "directly and proximately" harmed by a manslaughter offense, even though the children were with foster families and the victim had been paying child support for them through a state child welfare agency. The court held that the children were "victims" within the meaning of § 3663A, because they were "directly and proximately" harmed as a result of their father's death, losing, among other things, a source of financial support.[79] In U.S. v. Crandon,[80] the Third Circuit upheld psychiatric care for the 14 year old victim, molested by the defendant who found the victim on the internet, was harm to the victim "proximately resulting" from the offense.

The Eighth Circuit, in U.S. v. Rea,[81] relied upon a different MVRA provision to uphold a restitution award in an arson case. Section 3664(f)(1)(A) states, "In each order of restitution, the court shall order restitution to each victim in the *full amount of each victim's losses* as determined by the court and without consideration of the economic circumstances of the defendant." (emphasis added)

The courts have generally agreed that pre-judgment interest should be included in the computation of restitution owed the victim at sentencing, because it is part of the loss caused to the victim by the defendant's offense conduct. On the other hand, the analysis regarding whether attorneys fees are included in restitution starts from the general legal premise that attorneys fees are generally *not*

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[76]U.S. v. Martin, 195 F.3d 961 (7th Cir. 1999) (citing U.S. v. Menza, 137 F.3d 533, 537-39 (7th Cir. 1998) and U.S. v. Rice, 38 F.3d 1536, 1540 (9th Cir. 1994).

[77]U.S. v. Martin, 128 F.3d 1188, 1190 (7th Cir. 1997).

[78]175 F.3d 782 (10th Cir. 1999).

[79]Id. at 795. However, the court found that the court ordered the restitution to be paid to a beneficiary (the state agency) that is not authorized by statute, and the case was remanded to reconsider the order in light of the beneficiaries specified in § 3663A(a)(2) as available for victims under 18 years of age.

[80]173 F.3d 122 (3d Cir. 1999).

[81]69 F.3d 1111, 1114 (8th Cir. 1999).

recoverable unless provided by statute. Therefore, victims' attorneys fees are *not* included in the amount of restitution, *unless* they are directly related to the criminal conduct for which the defendant was convicted.[82] Also, attorneys' fees are "consequential" losses (indirect), and restitution is primarily a reimbursement of "actual" loss.[83]

A recent case that beautifully illustrates the fundamental purpose of restitution, which is ro "restore" the victim, involved the arson of a century-old church. The Sixth Circuit held that a victim is entitled to the retail value, as opposed to actual cost, of goods which the defendant acquired by fraud and then sold (at retail prices).[84] And in U.S. v. Shugart, 176 F.3d 1373 (11th Cir. 1999), the Eleventh Circuit upheld the sentencing court's valuation of a century-old-church that had been destroyed by arson as the replacement value of the near-identical church on the same property, as coming the closest to a "restoration" of as many of the values, memories, and benefits of the old church as possible. Replacement cost here used modern equipment and materials that might have resulted in a gain to the victim, but this method was better than merely the purchase of a similarly-valued church on another site.

Future harms. Future harms are conceptually included in the restitution determination, at least to the extent that they can be determined with sufficient specificity. This principle is at least implied by the MVRA provision, § 3664(d)(5) that allows the court to increase the restitution amount based on newly discovered losses, after sentencing, under certain circumstances.[85] The Ninth Circuit recently focused on this issue in U.S. v. Laney, in which the defendant was convicted of engaging in the sexual exploitation of a child.[86] The court ordered the defendant to pay restitution to the child for present and future counseling expenses, and the Ninth Circuit upheld the award. The court noted that compensable losses under § 2259 (the relevant specific mandatory restitution statute) specifically include costs of the victim's "medical services relating to physical, psychiatric, or psychological care,"[87] and that Congress must have intended compensation for harm occurring post-sentencing because § 3664(d)(5) allows the court to order restitution for losses not ascertainable at the time of sentencing. The court also found the award to be appropriate because, given the expert testimony on the victim's need for 6 years of

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[82]U.S. v. Diamond, 969 F.2d 961, 968 (10th Cir. 1992).

[83]U.S. v. Stoddard, 150 F.3d 1140, 1147 (9th Cir. 1998).

[84]U.S. v. Lively, 20 F.3d 193 (6th Cir. 1994).

[85]Section 3664(d)(5) states: "[After sentencing] If the victim subsequently discovers further losses, the victim shall have 60 days after discovery of those losses in which to petition the court for an amended restitution order. Such order may be granted only upon a showing of good cause for the failure to include such losses in the initial claim for restitutionary relief."

[86]189 F.3d 954 (9th Cir. 1999).

[87]§ 2259(b)(3)(B).

treatment, the cost to the victim was "ascertainable" at sentencing.[88] In fact, because it was ascertainable at sentencing, the victim may be foreclosed from pursuing the costs later, under § 3664(d)(5). Finally, the court found that Congress would not have intended the "strangely unwieldy procedure" of requiring a victim to petition the court for an amended restitution order every 60 days for as long as the therapy lasted."[89] While part of the Laney opinion relies on the language in § 2259, much of its analysis is stated in broad enough terms to lend support to restitution awards for future harms in other kinds of cases, so long as the calculation of the future loss can be made with "reasonable certainty."

Child Support Recovery Act (CSRA) (18 U.S.C. § 228). Special rules apply to this mandatory "restitution" offense; the 5-step analysis is not applicable. Title 18 § 228, effective October 25, 1992, was the first "mandatory" restitution provision in federal law. Section 228(a) makes it a federal offense for anyone who *"willfully fails to pay a past due support obligation with respect to a child who resides in another State."* A "past due support obligation" is a court or administrative order *"for the support and maintenance of a child or of a child and the parent with whom the child is living... that has remained unpaid for a period longer than one year or is greater than $5,000."*[90] The Deadbeat Parents Punishment Act of 1998 (DPPA) added, among other things: 1) the offense of traveling in interstate or foreign commerce with the intent of evading a support obligation, and 2) enhanced punishment if the amount owed is greater than $10,000 or is unpaid for longer than 2 years. Section 228(c) provided, *"Upon a conviction under this section, the court shall order restitution under section 3663 in an amount equal to the past due support obligation as it exists at the time of sentencing."* The DPPA changed the reference from § 3663 to § 3663A (now at § 228(d)). The courts have universally upheld the constitutionality of the CSRA and denied various challenges to its constitutionality.[91]

All courts that have faced the issue have decided that it is not a violation of the *ex post facto*

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[88] Id. at 967, n. 14 (citing U.S. v. Fountain, 768 F.2d 790, 801-2 (7th Cir. 1985), reversing a restitution award, pre-MVRA, that compensated for a victim's lost future wages because of the uncertain nature of the calculation). The court also noted that in Laney, "the government's estimate of the amount was well-supported and exact, and ... Laney did not contest it."

[89] Id. at 966-67.

[90] § 228(d) (1995).

[91] U.S. v. Bongiorno,106 F.3d 1027 (1st Cir. 1997) (commerce clause; Tenth Amendment); U.S. v. Parker, 108 F.3d 28 (3d Cir. 1997) (Tenth Amendment; commerce clause); U.S. v. Bailey, 115 F.3d 1222 (5th Cir. 1997), cert denied, 118 S.Ct. 866 (1998) (does not offend principles of federalism or comity; Tenth Amendment; commerce clause; domestic relations exception to federal jurisdiction); U.S. v. Black, 125 F.3d 454 (7th Cir. 1997) (Tenth Amendment; commerce clause); U.S. v. Crawford, 115 F.3d 1397 (8th Cir. 1997); U.S. v. Ballek, 170 F.3d 871 (9th Cir. 1999) (Thirteenth Amendment); U.S. v. Craig, 181 f.3d 1124 (9th Cir. 1999) (Fifth Amendment and Commerce Clause); U.S. Hampshire, 95 F.3d 999 (10th Cir. 1996) (Tenth Amendment; commerce clause; Fourteenth Amendment); U.S. v. Williams, 121 F.3d 615 (11th Cir. 1997) (commerce clause, Tenth Amendment);domestic relations exception to federal jurisdiction).

clause to apply the CSRA to debt accrued prior to its passage, for varying reasons. All agree that the *ex post facto* clause does not apply because failure to pay child support is a "continuing" offense that continues past the enactment of the CSRA; also, the Act did not criminalize the accrual of arrearage, but only the willful failure to pay it, which continued past its enactment.[92] And the Seventh and Tenth circuits (consistent with their conclusion that the *ex post facto* clause is not applicable to restitution), have found that restitution under the CSRA is not subject to *ex post facto* constraints because restitution is compensatory, not punitive.[93]

The amount of restitution in these cases is not computed according to the same "steps" as in other cases, because it is specifically set by statute, i.e. the amount of support obligation that is "due at sentencing." Because § 228(d)(1)(A) defines "past due support obligation" to include support for the parent with whom the child is living, the 11th Circuit upheld a restitution award that included maintenance for the ex-spouse as well as for the child.[94] The Ninth Circuit has held that the amount of past due child support that can be ordered as restitution is not limited to the dates in the Indictment because the statutory reference to the amount due "at the time of sentencing" indicates Congress' "desire to charge the parent for all unpaid child support, including support that accrued before the indictment was issued."[95] The statute does not mention interest, but it would appear to be included, so long as the state law provided for the accrual of interest on past due support obligations. Further, the specific amount due does not have to be alleged in the indictment or proven, because it is a sentencing factor determined by the court at sentencing.

Courts agree that the defendant cannot seek to modify the court order in the federal proceeding. "A] parent who considers himself or herself unable to pay an order of child support must seek a modification of the order from the state court and not from the federal district court in a CSRA prosecution."[96] The CSRA is violated by a "willful" failure to pay a past due child support obligation. The legislative history of the Act indicates that the "willful" language was borrowed from the tax statutes that make willful failure to collect or pay taxes a Federal crime, and that the phrase should be interpreted in the CSRA as it is in felony tax provisions.[97] The Ninth and Eleventh circuits have held that "willfully" can be proved by either "having the money and refusing to use it for child support; or, not

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[92]U.S. v. Russell, 186 F.3d 883 (8th Cir. 1999); U.S. v. Crawford, supra; U.S. v. Rose, 153 F.3d 208, 210 (5th Cir. 1998).

[93]Black, supra; Hampshire, supra.

[94]U.S. v. Brand, 163 F.3d 1268, 1278 (11th Cir. 1998).

[95]U.S. v. Craig, 181 F.3d 1124, 1127 (9th Cir. 1999).

[96]U.S. v. Craig, 181 F.3d 1124, 1127-28 (9th Cir. 1999) (overruling this aspect of U.S. v. Mussari, 152 F.3d 1156 (9th Cir. 1998)); Ballek, supra; Brand, supra; Bailey, supra.

[97]H.R.Rep. No. 102-771, at 6 (1992).

having the money because one has failed to avail oneself of the available means of obtaining it."[98]

Restitution is mandatory under the CSRA, and probably always has been, despite the fact that the reference to § 3663 was not changed to § 3663A until 1998. Section 228 has always stated that the court "shall" order restitution. And in 1998 the DPPA changed the cross-reference in § 228 from § 3663 to § 3663A. Also, the Act specifies the amount to be imposed is that "due at sentencing," with no mention of the consideration of the defendant's resources. In 1998 Congress added § 228(b), which provides: *"The existence of a support obligation that was in effect for the time period charged in the indictment or information creates a rebuttable presumption that the obligor has the ability to pay the support obligation for that time period."* It would appear that the defendant's ability to pay is relevant, but, as the case law indicates, it is a very difficult burden for the defendant to prove inability to pay under the CSRA.

D. *Step four*: Identity Which Harms and Costs are Compensable as Restitution

The federal restitution statutes include specific language specifying what harms or costs suffered by victims of the offense are compensable (i.e. authorized to be paid) as restitution. Because restitution is a statute-based penalty, nearly all courts have interpreted the compensable harms listed in the restitution statutes to be exclusive, and to vacate restitution orders compensating harms not tied to the statutory language. Specific compensable harms are listed in the primary restitution statutes, §§ 3663 and 3663A, according to the kind of harm the victim suffered due to the offense, and a more inclusive list can be found in the specific title 18 mandatory restitution statutes.

A recent Tenth Circuit case indicates that the government and the court sometimes forget that a broader restitution statute is available. In U.S. v. Johnson,[99] the defendant met the minor victim on the internet and traveled across country to engage in sex with the victim, who eventually required mental health treatment as a result of the offense. The defendant was convicted of 18 U.S.C. § 2252 (possession of child pornography), and §§ 2422 and 2423 (coercion and enticement of minor and interstate travel for the purpose of engaging in sexual acts with a minor). The court imposed restitution for the full amount of the victim's mental health treatments, and eventually upheld the restitution award - but with much more difficulty than would be needed if the sentencing court had invoked the specific restitution statute applicable to the offense in imposing the restitution.

The defendant claimed that the court should have considered his ability to pay in imposing the restitution. The Tenth Circuit, in a case of first impression, found that offenses under 2422 and 2423

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[98] Ballek, supra, and Williams, supra.

[99] 183 F.3d 1175 (10th Cir. 1999).

are crimes of violence, as defined in § 16, for which restitution is mandatory pursuant to § 3663A,[100] and therefore the defendant's ability to pay was irrelevant. The defendant also claimed that restitution was not authorized for mental health treatments (it is not listed in §§ 3663 or 3663A). The Tenth Circuit, reaching to uphold the restitution for the sympathetic, minor victim, noted that the defendant asserted at sentencing that he was responsible for some of the victim's mental problems and should only have to pay restitution for some of the treatment, and therefore he was foreclosed from challenging the basis of the treatment on appeal. However, § 2248 was applicable to the §§ 2422 and 2423 offenses,[101] and it makes it clear that restitution is mandatory for those offenses. It also specifically authorized restitution for mental health treatment.

"In any case." The restitution statutes provide that, *"In any case," restitution should be ordered for "lost income, necessary child care, transportation, and other expenses related to participation in the investigation and prosecution of the offense or attendance at proceedings related to the offense."*[102] Presumably, "in any case" would include those in which the "victim" suffers no other loss. Thus, in a bank robbery in which the stolen funds were returned, the bank victims would presumably still get restitution for their expenses in participating in the case. This form of restitution has frequently been overlooked, because it is not included in the "loss" of the offense under guideline sentencing.

Two recent Second Circuit cases use this provision in interesting ways. In U.S. v. Malpeso, the court combined it with § 3664(j)(1), which authorizes restitution to third parties who compensate victims, to uphold a restitution order to the FBI for the expenses involved in relocating a witness to make the witness available for cooperation with the prosecution.[103] If the victim had paid the expenses himself, it would have been compensable under § 3663A(b)(4), and the FBI functioned as a third party, compensating the victim for these compensable expenses. In U.S. v. Hayes, the Second Circuit upheld restitution for the victim's costs incurred in obtaining a protection order against the defendant's challenge that the costs were incurred prior to the offense conduct (i.e., crossing state lines in violation of the protection order).[104] The court noted that Congress did not intend that restitution be restricted to only those harms incurred during the actual commission of the offense, because it authorized restitution for victims' costs incurred in participating in the case, which necessarily occurs well after the commission of the offense.

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[100]It noted the only other case close to the issue was U.S. v. Butler, 92 F.3d 960, 964 (9th Cir. 1996), finding that § 2423(b) is, by nature, a crime of violence).

[101]It is applicable to Chapter 109 of Title 18, which includes the offenses of which the defendant was convicted.

[102]§§ 3663A(b)(4) and 3663(b)(4).

[103]126 F.3d 92 (2d Cir. 1997).

[104]135 F.3d 133 (2d Cir. 1998).

Specific title 18 mandatory restitution statutes. There are an increasing number of cases to which the specific title 18 mandatory restitution statutes apply.[105] These statutes authorize a broader scope of restitution than do the principle restitution statutes. They provide that the defendant shall pay the "*full amount of the victim's losses*."[106] This language has been used by several courts to uphold restitution in these cases, although courts have so far not used the nearly identical provision in § 3664(f)(1)(A),[107] which applies to all restitution orders, to expand the harms that can be compensated with restitution.[108]

Three of the specific mandatory restitution statutes in title 18 (§§ 2248(3), 2259(3), and 2264(3)) include their own listing of compensable losses, which are broader than those listed in §§ 3663 or 3663A. These are:

"*any costs incurred by the victim for --*

(A) medical services, relating to physical, psychiatric, or psychological care;
(B) physical and occupational therapy or rehabilitation;
(C) necessary transportation, temporary housing, and child care expenses;
(D) lost income; (E) attorneys' fees, as well as other costs incurred; and
(F) any other losses suffered by the victim as a proximate result of the offense"

There have been several recent cases that have illustrated the courts' application of these provisions in offenses to which these "specific" mandatory restitution provisions apply.

§ 2248 (sexual abuse). As noted above, the court in U.S. v. Johnson,[109] could have easily relied on this statute to impose restitution for the mental health treatments of the juvenile sexual abuse victim, which are specifically provided for in § 2248(b)(3)(A).

§ 2259 (sexual exploitation of children). The Ninth Circuit upheld restitution for future psychiatric counseling costs for the victim, in U.S. v. Laney, as discussed above,[110] based partially on the "full amount of the victim's losses" language in § 2259, partly on § 3664(d)(5), which provides for

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[105]§§ 2327, 2248, 2259, and 2264.

[106]In addition, §§ 2327(2) and (3) provide that restitution must be imposed for "*all losses suffered by the victim as a proximate result of the offense*" (for telemarketing offenses).

[107]Section 3664(F)(1)(A) states, "In each order of restitution, the court shall order restitution to each victim in the full amount of each victim's losses as determined by the court and without consideration of the economic circumstances of the defendant."

[108]This language might be interpreted as an indication that compensable harms are not limited to those listed in the restitution statutes, and that, for example, psychological treatment might be authorized even without bodily injury.

[109]183 F.3d 1175 (10th Cir. 1999).

[110]189 F.3d 954 (9th Cir. 1999). See discussion under "future harms" above.

restitution for losses discovered in the future, and partly on the costs "incurred" language in § 2259. In U.S. v. Crandon,[111] the Third Circuit also upheld psychiatric care, based on the "full amount of the victim's losses" in § 2259. The court also found that in-patient psychiatric care of the 14 year old victim, molested by the defendant was harm to the victim "proximately resulting" from the offense.

§ 2264 (domestic violence) . In U.S. v. Hayes,[112] the Second Circuit upheld restitution for the victim's legal costs incurred prior to the defendant's interstate travel to violate her protection order, as costs "caused" by the offense conduct. It relied on the language in § 2264 that authorizes restitution for the "full amount of losses" caused by the offense, and on § 3663A(b)(4) that allows restitution for costs incurred after the offense (in cooperation with the prosecution of the case).

§ 2327 (telemarketing). In 1994 Congress passed the SCAMS Act[113] (18 U.S.C. § 2325-27), which enhanced the penalties and provided for mandatory restitution for certain "telemarketing" kinds of offenses. The original statute provided for detailed procedures by the U.S. Attorney in obtaining information from the victims, but the MVRA substituted the procedures at § 3664, which include duties by the probation officer in obtaining the information. In U.S. v. Baggett, the defendant challenged application of the Act to his offense, which was committed prior to the 1996 changes, but the Ninth Circuit held that the changes to the Act were merely procedural, and therefore applicable to the defendant's offense.[114] Another recent case involving a telemarketing fraud is U.S. v. Grimes,[115] in which the court held that the sentencing court should use § 3664(d)(5), which provides for a 90-day continuance of the restitution determination, in order to be able to identify as many victims as possible by sentencing.

E. *Step Five*: Effect of Plea Agreement on Restitution Amount

After the restitution amount is determined, based on the analyses discussed above, the plea agreement should be reviewed to determine if it allows more restitution to be imposed. The VWPA, as modified by the MVRA, contains three provisions regarding plea agreements that can authorize a greater amount of restitution to be imposed than could otherwise be imposed.[116] The plea agreement

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[111]173 F.3d 122 (3d Cir. 1999).

[112]135 F.3d 133 (2d Cir. 1998).

[113]The Act was known as the "Senior citizens Against Marketing Scams Act of 1994."

[114]125 F.3d 1319, 1323, n.5 (9th Cir. 1997).

[115] 173 F.3d 634 (7th Cir. 1999).

[116]§ 3663(a)(3) (restitution in any case to the extent agreed to by the parties in the plea agreement); §§ 3663A(a)(3) and 3663(a)(1)(A) (restitution to persons other than the victim of the offense); and § 3663A(c)(2) (mandatory restitution for non-qualifying offense, if the parties agree the plea resulted from a qualifying offense).

must be very specific in order to be the basis of restitution that is not otherwise authorized (using Steps 1-4, above). Restitution imposed pursuant to these plea agreement provisions is a separate order, and not merely a condition of supervision, because their authorizing provisions are in the primary restitution statutes.

Another issue regarding pleas, is whether restitution can be imposed where the defendant was not properly advised of the possibility of restitution being imposed at the plea. The best practice is, without doubt, to advise the restitution at the plea of the fact that restitution could be imposed. Rule 11, Federal Rules of Criminal Procedure, requires the court to determine, before accepting a plea, that the defendant understands the penalties of the offense to which he or she is pleading, including *"when applicable, that the court may also order the defendant to make restitution to any victim of the offense."*[117] However, Rule 11(h) specifies that any failure to adhere to the required procedures under the rule shall be disregarded to the extent such failure does not affect the "substantial rights" of the defendant (i.e. where the error is harmless). Nor is there a need for defendants to be advised of any and all indirect collateral consequences of the plea.[118]

Accordingly, where the defendant was merely advised of a potential fine in an amount at least as great as the ultimate restitution imposed, courts have upheld the restitution order, finding harmless error.[119] For example, in U.S. v. Crawford,[120] the defendant was advised that he could be required to pay a fine of up to $500,000, but not advised of the possibility of restitution. The Ninth Circuit found that the defendant "could not have been surprised or prejudiced by the imposition of $64,229 as restitution in light of his potential liability for $500,000." The Third Circuit used the same rationale to uphold a $1 million fine in U.S. v. Electrodyne Systems Corp.[121]

Conclusion. As more and more cases that require mandatory restitution are being sentenced by federal courts, parties and courts are being increasingly forced to analyze the many issues involved with the determination of restitution. The five suggested steps, introduced in December 1998, and updated above, appear to provide some assistance in the analysis of how much restitution can, or should, be imposed in mandatory restitution cases. In discretionary restitution cases, the same

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[117]Rule 11(c)(1).

[118]See, e.g., U.S. v. Suter, 755 F.2d 523 (7th Cir. 1985), cert denied, 105 S.Ct. 2331 (1986), finding no error where defendant was not informed that the conviction could lead to imposition of treble damages in related civil action for mail fraud.

[119]But see, U.S. v. Pogue, 865 F.2d 226 (10th Cir. 1989), holding that § 2255 relief might be available to a defendant not advised of restitution consequences.

[120]169 F.3d 590, 592 (9th Cir. 1999). See also, U.S. v. Pomazi, 851 F.2d 244, 248 (9th Cir. 1988) (same); U.S. v. Fox, 941 F.2d 480, 484 (7th Cir. 1991), cert denied, 112 S.Ct. 1190 (1992).

[121]147 F.3d 250, 253 (3d Cir. 1998).

determination must be made, and then that "harm" is imposed to the extent that the court finds the defendant has the future ability to pay, over the life of the obligation. Thus, this determination is the first determination that must be made in all restitution cases. The imposition of a legally valid restitution order is not only in the benefit of the victims of crime, but it also avoids unnecessary litigation and resentencings.